

the Settlement is in the public interest and adopt it without material modification.

I. COMMENTS

Skagit County supports the Settlement. The Settlement is designed to assist the County in achieving its goals of improving flood control in the Skagit River system and enhancing recreational opportunities at Lake Shannon.

The Skagit River presents a significant flood risk to Skagit County's 110,000 citizens. Damage resulting from a 100-year flood event may exceed \$1 billion, as predicted by the U.S. Army Corps of Engineers ("Corps"), and put lives at risk. Since 1991, four floods have caused \$71 million in flood damage in Skagit County, with the flood of record occurring in October 2003. The Baker River system contributes substantially to Skagit River flooding and existing flood storage in the system is inadequate. Because of its downstream location within the Skagit Basin, adequate flood storage within the Baker River system is critically important to safely manage a Skagit basin flood event. Four real-world flood events over the past 15 years demonstrated the inadequacies of flood storage in the Baker River system. To reduce this substantial risk to the public health and safety of Skagit County citizens, the County intends to work with PSE and all of the other stakeholders to ensure that the Settlement is implemented in a manner that ensures adequate flood storage at the Project.

A. **The Comprehensive Settlement Submitted by PSE Encompasses Flood Control for the Entire Term of the New License.**

The flood control provisions of the Settlement were the result of extensive and, at times, challenging negotiations between PSE, Skagit County, and other stakeholders. In the end, the parties all agreed to include in the Settlement the following proposed flood control license article provisions:

Article 107
Flood Storage

(a) The licensee shall so operate the Upper Baker River reservoir as to provide each year 16,000 acre-feet of space for flood regulation between October 15 and March 1 as replacement for the valley storage eliminated by the development. Utilization of this storage space shall be as directed by the District Engineer, Corps of Engineers. In addition to the above-specified 16,000 acre-feet, the licensee shall provide in the Upper Baker River reservoir space for flood control during the storage drawdown season (about September 1 to April 15) up to a maximum of 58,000 acre-feet as may be requested by the District Engineer, provided that suitable arrangements shall have been made to compensate the licensee for the reservation of flood control space other than the 16,000 acre-feet specified herein.

(b) Additionally, from October 1 to March 1, licensee shall operate the Lower Baker storage reservoir to provide up to 29,000 acre-feet of storage for flood regulation, at the direction of the District Engineer, Corps of Engineers, acting on behalf of the Secretary of the Department of the Army, subject to the following: (i) such storage shall be provided only in accordance with arrangements that are acceptable to the Corps of Engineers; and (ii) such storage shall be provided only after suitable arrangements have been made to compensate the licensee for the 29,000 acre-feet of storage for flood regulation specified herein.

(c) Licensee shall consult with the ARG, and specifically Skagit County and the Corps of Engineers, to develop means and operational methods to operate the Project reservoirs in a manner addressing imminent flood events and consistent with the requirements of the license. Appropriate means and methods may include, without limitation, additional reservoir drawdown below the maximum established flood pool. Licensee shall submit a report to the Commission within three years following license issuance describing any operational changes developed as a result of this consultation.

Article 106²
Flow Implementation

(L) Conflicts. If a conflict arises between the ramping rates or flow regimes in Article 106 and the additional flood control measures implemented as a part of Article 107(b) or (c), then the licensee shall modify its operations to the minimum

² Other provisions relating to flood control as contained in the Settlement include Section 4.1.1 (relating to reservoir drawdown targets when a flood event is imminent), Section 4.1.2 (relating to cooperation between PSE and the County to amend the Corps Baker River Project “Water Control Manual”), Section 5.9 (relating to the determination of suitable arrangements to compensate PSE for the reservation of flood control at Upper Baker), Section 6.2 (relating to environmental review), Article 106(c) (relating to the implementation of Aquatics Table 2), and Appendix B (relating to an agreement between Skagit County and PSE to work collaboratively to implement Article 107).

extent necessary to avoid the conflict in a manner to protect aquatic resources.

In sum, the Settlement authorizes up to 74,000 acre-feet of flood storage at Upper Baker (which is currently being provided under Article 32 of the original license) and up to 29,000 acre-feet of flood storage at Lower Baker, subject to the direction of the Corps and suitable compensation to the licensee. In addition, the proposed license article also requires PSE to develop means and operational methods to provide additional drawdown in advance of an imminent flood. Finally, language included in Proposed License Article 106 (“Article 106”) assures that flood control measures do not interfere with the water flows needed to protect aquatic resources. This provision helps guarantee that flood control operations will not adversely impact downstream aquatic resources, including fish species listed under the Endangered Species Act.³

The plain text of the proposed flood control license article and related provisions included in the Settlement make it clear that it is the intention of the Settlement signatories that Proposed License Article 107 (“Article 107”) and Article 106(L) *govern flood control operations at the Baker River Project for the entire term of the new license*. Therefore, Article 107 is not a “placeholder,” “interim,” or “temporary” flood control license article, and there is no language anywhere in the Settlement that supports such a characterization. The Commission should give no credence to unsupported after-the-fact claims that the flood control provisions of the Settlement are a “placeholder.”⁴

³ Another benefit of this provision is that it will simplify the Commission’s NEPA analysis of the downstream fishery impacts of additional flood control.

⁴ Tellingly, the Parties that claim the flood control provisions are a “placeholder” due to the subsequent involvement of the Corps do not argue that the fish passage license articles which provide for a similar post-licensing approval role for NOAA Fisheries and USFWS are also “placeholders.”

B. Parties “Agreed to Disagree” on Timing and Scope of NEPA Analysis of Additional Flood Control.

As discussed in FERC’s December 8, 2004, technical conference, the Parties could not agree on the timing of the NEPA environmental analysis regarding the additional 29,000 acre-feet of flood storage in Lower Baker or whether FERC or the Corps should conduct such NEPA analysis. It was instead agreed that the Settlement would be silent on these questions.

As part of this “agreement to disagree” on the course of the NEPA process for additional flood control, the following language was added to Section 6.2 of the Settlement:

Except as otherwise provided in this Settlement, nothing in this Settlement shall be construed as limiting any Party’s participation subsequent to the Effective Date in any environmental review proceedings, to the extent the process addresses environmental impacts not otherwise addressed in the PDEA.

This language is intended to ensure that all parties have the right to provide comments to FERC or the Corps regarding the environmental impacts of measures not analyzed in the Preliminary Draft Environmental Assessment (“PDEA”) submitted by PSE with its Application for a New License, such as the addition of up to 29,000 acre-feet of flood control storage in the Lower Baker Reservoir.⁵ Therefore, to the extent any Parties possess evidence regarding either positive or negative environmental impacts associated with the proposal for increased flood storage in Lower Baker, they are permitted to provide such comments to the FERC as part of the relicensing NEPA process without violating the terms of the Settlement. This will greatly facilitate the Commission’s NEPA review of the environmental impacts of additional flood

⁵ The 29,000 acre-feet of flood control storage in Lower Baker was not addressed in the PDEA because it was not included as a proposal in PSE’s license application.

storage because all of the available environmental information will be before the Commission.

The Parties' disagreement relating to the NEPA process for additional flood control storage does not mean the Settlement is not "comprehensive." All Parties support the Settlement in its entirety, including the flood control provisions. The disagreement regarding the NEPA process is also not a barrier to FERC approval of the comprehensive Settlement as submitted, including the flood control provisions of the Settlement. Ultimately, it is up to FERC, not the Parties to the Settlement, to determine the scope, content and timing of FERC's NEPA analysis.

Indeed, the County is unaware of any comprehensive relicensing settlement submitted to FERC containing language specifying the scope, content and timing of FERC's NEPA review of a settlement. Instead, as occurred in this proceeding, parties typically submit comprehensive settlements to FERC that specify the licensee's substantive and procedural obligations for the term of the new license. FERC then decides what type of environmental review is required under NEPA and the FPA.

C. The Commission Must Examine the Flood Control Measures Prescribed in Article 107.

1. Pursuant to Section 10 of the FPA, the Commission shall consider the flood control measures in the Settlement.

It is the expectation of the County that the flood control provisions in Article 107 of the Settlement and related provisions shall be considered by the Commission in the same manner as any other key provision of the Settlement and are not to be deferred to a subsequent process conducted by another agency at some unspecified time in the future.

Section 10(a) of the FPA provides:

That the project adopted ... shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and

utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, **flood control**, water supply, and recreational and other purposes referred to in section 4(e) of this title.⁶

The Commission's comprehensive licensing authority, including its flood control responsibilities, is well established. This responsibility may not be deferred, abdicated or delegated to other federal or state agencies. Instead, pursuant to Section 10(a), the Commission must make a determination as to "whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest,'" such as flood control.⁷

Although the Commission often relies on the Corps for its expertise on flood control matters, the Commission has an independent obligation to consider and order flood control measures pursuant to Section 10(a). This public interest obligation is not extinguished by the existence of a separate Corps process to consider flood control in the Skagit River Basin. In fact, consistent with its Section 10(a) mandate, the Commission has previously acted on flood control matters contrary to the recommendations of the Corps. For example, in *Grand River Dam Authority*, the Commission approved a modified rule curve for a hydroelectric project to better accommodate spring run-off, notwithstanding a request from the Corps to wait until it completed its own studies that evaluated the effects of flood control operations and the backwater effects of operating the project.⁸

⁶ 16 U.S.C. § 803(a).

⁷ *Udall v. FPC*, 387 U.S. 428, 450 (1967).

⁸ *Grand River Dam Authority*, 77 FERC ¶ 61,251 (1996). See also, *The Empire District Electric Company*, 95 FERC ¶ 62,076 (2001) (Commission rejects license language proposed by the Corps that would have required the licensee to adjust project spillway capacity to accommodate high flows from an upstream Corps dam based on assessment that spillway adjustment was not necessary).

Moreover, the “public interest” mandate under the FPA also requires the Commission to engage in a wide-ranging and comprehensive environmental analysis to determine the impacts of a proposed action. The Commission has stated that the FPA “requires development of a comprehensive plan and consideration of cumulative impacts before licenses are issued.”⁹ Ultimately, it is the Commission’s responsibility to “fulfill its obligation of exploring all issues relevant to the public interest.”¹⁰

Requests that FERC defer its Section 10(a) responsibility to consider and act on flood control should be denied by the Commission as contrary to the public interest and the Commission’s Section 10(a) mandate. Such a deferral would compromise the public interest in a number of ways, including jeopardizing the Settlement and pointlessly delaying urgently needed flood control storage improvements in the Skagit River Basin.

It is also important to note that only the Commission has flood control jurisdiction over Lower Baker, including the proposal in the Settlement to provide up to 29,000 acre-feet in additional storage.¹¹ Lower Baker is subject to FERC jurisdiction as a licensed project under the FPA. The Corps will only obtain limited jurisdiction over Lower Baker if and when the Commission approves Article 107 of the Settlement, which provides that the additional storage authorized must be accepted by the Corps. The Corps may then approve the implementation of the authorized flood control pursuant to its regulations which state that:

⁹ *National Wildlife Federation v. FERC*, 801 F.2d 1505, 1507 (9th Cir. 1986); *see also LaFlamme v. FERC*, 852 F.2d 389, 401 (9th Cir. 1988).

¹⁰ *Id.* at 403, *see also National Wildlife Federation*, 801 F.2d at 1513; *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 472 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (hereinafter “Yakima”).

¹¹ The Corps currently has limited jurisdiction over the provision of flood control at the Upper Baker Reservoir. However, it is important to remember that the genesis of the limited Corps jurisdiction over Upper Baker Reservoir is Article 32 of the original Baker River Project, issued by the Federal Power Commission in 1956.

The Commission may further stipulate as a licensing condition, that a licensee enter into an agreement with the Department of the Army providing for operation of the project during flood times, in accordance with rules and regulations prescribed by the Secretary of the Army.¹²

Consequently, action by FERC is necessary prior to any future Corps action. Ultimately, if FERC does not exercise its clear authority pursuant to the FPA to authorize additional flood control, no flood control measures will be implemented at Lower Baker.

The relicensing process is the forum to conduct the public interest/environmental review of flood control measures contained in the Settlement. The FPA, FERC precedent, established case law, and the lack of Corps jurisdiction at Lower Baker all establish that FERC has clear authority to authorize enhanced flood control storage at the Project if it determines that such storage is “best adapted to a comprehensive plan for improving or developing” the Baker River, and is otherwise in the “public interest.”

2. NEPA Requires the Commission to Fully Analyze Environmental Impacts of Proposed License Articles, Including Flood Control.

NEPA requires that the “action agency,” here FERC, fully analyze the environmental impacts of proposed licenses. NEPA requires that “to the fullest extent possible” the responsible federal agency shall prepare detailed statements on “the environmental impact of the proposed action.”¹³ In this proceeding, the “proposed action” is the comprehensive Settlement submitted by PSE, which includes a proposed flood control license article and related provisions intended to govern flood control operations at the Project for the entire term of the new license.

Therefore, the Commission must fully analyze the environmental impacts of the proposed flood

¹² See 33 CFR § 208.11(b)(3)(i). Reliance on this commonly used existing authority to address Lower Baker flood storage is one means available to the Corps to implement the flood control requirements of the new license without additional legislation.

control license article in the Settlement, including the proposal to provide up to 29,000 additional acre-feet of flood storage in the Lower Baker Reservoir.

Courts have also concluded that the Commission must examine all relevant environmental factors in a relicensing proposal prior to issuing a new license. Specifically, in *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, the Ninth Circuit held that the Commission must not defer consideration of key environmental issues until after relicensing. Moreover, the court commented that the FPA imposes NEPA-type obligations on the Commission to “see to it that the record is complete” and that it must fulfill its “affirmative duty to inquire into and consider all relevant facts.”¹⁴

In *LaFlamme, supra*, the Ninth Circuit considered whether the Commission’s reliance on post-licensing studies constituted a sufficient analysis under NEPA. The court noted that NEPA’s purpose requires that “consideration of environmental impacts of proposed projects take place before any licensing decision is made.”¹⁵ Accordingly, the Commission must examine the environmental impacts of all aspects of the Settlement at this time, including the proposal for the addition of up to 29,000 acre-feet of flood storage in the Lower Baker Reservoir, prior to issuing a new license for the Project. Any abdication of NEPA responsibilities to other agencies would be contrary to the law.

3. The Commission may not abdicate its FPA and NEPA responsibilities due to subsequent agency approvals or authorizations.

As the *Yakima* decision emphasizes, an abdication of FPA and NEPA responsibilities on the grounds that such analysis is unnecessary due to subsequent agency action is unlawful. In

¹³ 42 USC § 4332.

¹⁴ *Yakima* at 472 (quoting *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965)).

Yakima, the Commission issued a new license to Public Utility District No. 1 of Chelan County for the Rock Island Project without conducting a NEPA analysis of fishery issues. FERC's reasoning was that no NEPA analysis was necessary because fishery issues were being dealt with in an ongoing FERC process entitled the "Mid-Columbia Proceeding," and that FERC had included a "reopener" in the new Rock Island license that would permit it to impose any fishery measures developed in the Mid-Columbia proceeding. The court rejected this approach, holding that fishery issues must be considered as part of the relicensing process and could not be deferred to subsequent Commission action in the Mid-Columbia Proceeding. Similarly, in this relicensing proceeding, the Commission may not defer its consideration of the environmental impacts of flood control measures included in the Settlement on the grounds that the Corps may examine these questions in another process at some unspecified date in the future.

A decision to defer or delegate FPA and NEPA analysis of key license provisions on the grounds that such provisions may only be implemented following subsequent agency approvals would dramatically and unlawfully diminish the Commission's role in the relicensing process. Many new licenses contain varying requirements that direct a licensee to obtain approval from a third party agency prior to taking certain actions; however, these subsequent approvals do not excuse FERC from fulfilling its FPA and NEPA responsibilities at relicensing.

For example, the Settlement submitted by PSE in this proceeding includes several requirements involving subsequent agency actions, including approvals by NOAA Fisheries, the United State Forest Service ("USFS"), and the United States Fish and Wildlife Service ("USFWS"). In particular, NOAA Fisheries and USFWS are required to approve an Upstream Fish Passage Implementation Plan ("UFPIP"), a Downstream Fish Passage Implementation Plan

¹⁵ *LaFlamme*, 852 F.2d at 400.

“DFPIP”), and a Fish Connectivity Implementation Plan (“FCIP”), along with certain other measures to improve connectivity between Lake Shannon and Baker Lake well after the issuance of the new license.¹⁶ The UFPIP and DFPIP will require approvals from NOAA Fisheries and USFWS for activities including passage construction and design, operation and maintenance, quality assurance and control, emergency response plans, and annual reporting requirements.¹⁷ Moreover, NOAA Fisheries and USFWS must approve the location and timing of a fishway and the species and numbers of fish to be collected and transported upstream of Upper Baker Dam in the context of improving connectivity between Lake Shannon and Baker Lake.¹⁸ Of course, the subsequent role assumed by NOAA Fisheries and USFWS in determining the implementation of these important environmental projects does not excuse the Commission from addressing fish passage in the NEPA analysis, nor does it require that NOAA Fisheries or USFWS conduct their own subsequent, separate NEPA analysis of fish passage.

Similarly, the provisions of Article 107 that provide for an analogous role for the Corps regarding flood control do not excuse the FERC from its NEPA responsibilities. Taken to its logical conclusion, the outcome of an approach where the FERC NEPA document did not analyze any issue that involved a subsequent approval by another agency would be that FERC would not analyze many major licensing issues, such as fish passage and flows, in its NEPA document.¹⁹ Consequently, FERC’s relicensing NEPA analyses would have gaping substantive holes and would only address license articles that include no role for any other federal, state, or

¹⁶ See Settlement at Proposed License Articles 101(d) (requiring approval of USFS prior to decommissioning certain fish propagation and enhancement measures), 103, 104, and 105.

¹⁷ Any modifications to passage facilities or operations shall also be approved by NOAA Fisheries and USFWS.

¹⁸ Additional agency approvals required in the Settlement include Proposed License Article 106 (requiring Washington Department of Ecology approval for temporary modifications to flows and ramping rates) and Proposed License Article 401 (requiring approval of a Water Quality Monitoring Plan by the Washington Department of Ecology).

local agency. In addition to being completely unworkable, such an approach would constitute an abrogation of FERC's responsibilities and frustrate FERC's comprehensive licensing authority as articulated by the Supreme Court in *First Iowa Hydro-Elec. Co-op. v. FPC*.²⁰ Despite the requirements in proposed Article 107 that flood control be subject to the direction or acceptance of the Corps, the Commission must consider all aspects of the Settlement, including the environmental impacts of the up to 29,000 acre-feet of additional storage in Lower Baker Reservoir.

D. A Failure to Conduct Required Environmental/Public Interest Review of Flood Control Will Likely Significantly Delay the Issuance of a New License.

All Parties to the Settlement support the timely issuance of a new license. In addition, all Parties to the Settlement support the flood control provisions of the Settlement. It is only the process for environmental analysis of additional flood storage that the parties disagree on. As stated, the responsibility for determining the scope, content and timing of the relicensing NEPA process lies with FERC, not the parties to the Settlement. The County strongly urges the Commission to approve the Settlement without modification, including Article 107. The Commission's action on those provisions related to flood control, including the appropriate environmental and public interest review, is critical to the continued success of the Settlement process and the County's urgent interest in assuring adequate flood control. A failure to conduct the required environmental and public interest review would jeopardize the Settlement and could lead to years of litigation and conflict. Such an outcome would needlessly delay urgently needed flood control storage improvements in the Skagit River Basin as well as the many other

²⁰ *First Iowa Hydro-Elec. Co-op v. FPC*, 328 U.S. 152 (1946) (Court concluding that the FPA was intended to "secure a comprehensive development of national resources" and that such authority is with the federal government).

benefits provided by the Settlement.

II. CONCLUSION

WHEREFORE, Skagit County respectfully requests that the Commission approve the Baker River Project Relicensing Comprehensive Settlement Agreement consistent with the comments herein.

RESPECTFULLY SUBMITTED this 23rd day of December, 2004.



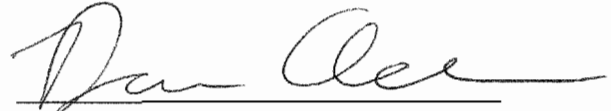
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served by U.S. Mail upon each person designated on the official service list compiled by the Secretary in this proceeding.

DATED at Washington, DC this 23rd day of December, 2004.

A handwritten signature in black ink, appearing to read "Dan Adamson", written over a horizontal line.

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